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**SA'ADI IBRAHIM & ANOR**

**v.**

**LIEW HAN SIN & ANOR**

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HIGH COURT SABAH & SARAWAK, KUCHING

LAU BEE LAN J

[CIVIL APPEAL NO: 12-32-2004-II]

13 FEBRUARY 2006

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**LIMITATION:** *Summons - Filing of - Delay in filing claims for compensation of injury - Whether plaintiff's claim against first defendant statute barred - Limitation Ordinance (Cap 49) (Sarawak), s. 11, Sch. Item 92 - Period of limitation - Whether to be extended - Whether court has discretion on equitable grounds to override provisions of Ordinance -*

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*Special damages - Whether plaintiff's claim for special damages statute barred - Limitation Ordinance (Cap 49) (Sarawak), Sch. Item 97 - Whether applicable - Whether claim for general damages and special damages can be split - Subordinate Courts Act 1948, s. 68*

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The appellants/plaintiffs ('the plaintiffs'), *vide* O. 49 r. 6 of the Subordinate Courts Rules 1980 ('SCR'), appealed against the decision of the sessions court judge allowing the first defendant's application made pursuant to O. 14 r. 21(1) of the SCR. The defendant had, *inter alia*, sought to strike out the plaintiffs' summons and statement of claim on the grounds that it was

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scandalous, frivolous and vexatious and an abuse of the process of the court. The plaintiffs' claim arose out of an alleged collision which occurred between a motorcycle ridden by the first and second plaintiff and a motorcar. The issue for the court's determination was whether the plaintiffs' claim against the first defendant was statute barred. It was the defendants' contention that by virtue of item 92 of the Schedule to the Limitation Ordinance (Cap 49) (Sarawak) ('the Ordinance') the plaintiffs have three years from the date of injury to file its claims and since the accident happened on 29 November 1996, following s. 11 of the Ordinance, the last day for filing the claim would be 29 November 1999. Therefore, since the plaintiffs' summons was dated 30 November 1999, the plaintiffs' claim was statute barred. However, the plaintiffs argued that (i) by virtue of item 92 of the Schedule to the Ordinance read together with s. 11 of the Ordinance, the date of filing of the claim should be forwarded for another day *ie*, 30 November 1999, which was eventually the date where

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summons was issued; (ii) there was no delay since 29 November 1999 was a national polling day and although it was not a public holiday but the firm had agreed to close the office to allow the staff to vote and (iii) even if there was a delay, it was only a delay of one day and for *bona fide* reasons, the court should exercise its unfettered discretion on equitable grounds to extend the period of limitation. The plaintiff also argued that the plaintiffs' claim for special damages, in particular damage to the motorcycle and items involved in the accident, was a separate claim for damage and property which falls under item 97 of the Schedule to the Ordinance and therefore was not statute barred.

**Held (dismissing the plaintiffs' appeal and upholding decision of the Sessions Court):**

- (1) The last date for the filing of the summons was 29 November 1999 since it was admitted that the said date was not a public holiday and it was not disputed it was a Monday wherein the court registry was opened for business. The plaintiffs' submission that the date of the filing of the claim should 'be forwarded for another day, *ie*, 30 November 1999, which was eventually the date where summons was issued' was without merit. (para 7)
- (2) Since the first defendant had pleaded the defence of limitation in his statement of defence, it was clear premised on the provisions of the Ordinance and the authorities governing the Ordinance that the plaintiffs' action was statute barred. The court had no discretion on equitable grounds to override the provisions of the Ordinance. (para 13)
- (3) The plaintiffs' claim was primarily a claim for compensation for injury under item 92 of the Schedule to the Ordinance as the plaintiffs were claiming general damages for the injuries sustained from the road accident encountered by the plaintiffs whilst the plaintiffs' claim for special damages including other losses and damages was but an outflow of their claim for damages emanating from the said accident. There was only one cause of action *ie*, the alleged negligence of the defendants and therefore the claim for general damages and special damages could not be split following s. 68 of the Subordinate Courts Act 1948. Since item 92 was the specific item which was applicable for purposes of the suit in question, item 97 being a residuary item was not applicable. (para 18)

**A Case(s) referred to:**

*Alias Ismail v. Hairuddin Mohamad & Anor* [1997] 4 CLJ 669 CA (**refd**)  
*Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC (**refd**)

*Chin Sin Lan v. Delta Finance Bhd* [2004] 3 CLJ 113 CA (**refd**)

**B** *Cybersoft Sdn Bhd v. Standard Chartered Bank* [2001] 1 AMR 1096 (**dist**)  
*Donovan v. Gwentoy Ltd* [1990] 1 All ER 1019 (**refd**)

*Firman v. Ellis* [1978] 1 All ER 853 (**refd**)

*Government of Malaysia v. Yee Kok Wei & Anor* (Kuching – Suit No. KG 268 of 1980) (**dist**)

*Hartley v. Birmingham City District Council* [1992] 2 All ER 213 (**refd**)

**C** *Kong Ming Bank Berhad v. Sim Siok Eng* [1982] 2 MLJ 205 (**refd**)

*Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor & Other Appeals* [2000] 3 CLJ 797 CA (**refd**)

*Lim Yok Kong v. Sivapiran Savapathy* [1992] 4 CLJ 2219 SC (**dist**)

*Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332 (**refd**)

**D** *Man Singh v. Ram Nath* AIR [1924] Allahabad 828 (**refd**)

*Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504 HC (**dist**)

*Qasim Beg v. Muhammad Zia Beg* AIR [1915] Allahabad 212 (**refd**)

*Ramsden v. Lee* [1992] 2 All ER 204 (**refd**)

*SR Manickavasagam v. G Muthuveeraswami Naidu & Ors* AIR [1963]

**E** Madras 362 (**refd**)

*Kok Song Kong v. Brunei Shell Petroleum Co Bhd* [1988] 1 MLJ 240 (**refd**)

*Thomson v. Brown & Anor* [1981] 1 WLR 744 (**refd**)

*Vun Chun Fah & Anor. v. Telekom Malaysia Bhd* [1977] MLJU 239 (**refd**)

**Legislation referred to:**

**F** Limitation Act 1953, s. 29

Limitation Ordinance (Cap 49) (Sarawak), ss. 3, 4 to 24, 11, Sch. Item 92

Subordinate Courts Act 1948, s. 68

Subordinate Courts Rules 1980, O. 14 r. 21(1), O. 49 r. 6

**G** Limitation Act 1908 [Ind], arts. 36, 80, 83, 84, 103, 104, 108, 116, 113, 120

Limitation Act 1963 [Ind], art. 36

**Other source(s) referred to:**

**H** *Halsbury's Laws of England*, 4th edn, vol 28, p 314, para 694

*Sanjiva Row's The Limitation Act*, 1963, vol 1, 7th edn 1973, p 11

*For the appellants/plaintiffs* - Addy Termizi; M/s Marikan & Assoc

*For the respondent/1st defendant* - Desmond Sahathevan; M/s Battenberg & Talma

**I** Reported by Suhainah Wahiduddin

## JUDGMENT

## Lau Bee Lan J:

[1] *Vide* O. 49 r. 6 of the Subordinate Courts Rules 1980 (“the SCR”), the appellants/plaintiffs (“the plaintiffs”) has appealed against the decision of the learned Sessions Court Judge made on 6 August 2004 and 10 August 2004 allowing the 1st defendant’s application made pursuant to O. 14 r. 21(1) of the SCR dated 5 March 2004. The 1st defendant is, *inter alia*, seeking to strike out the plaintiffs’ summons dated 30 November 1999 and the statement of claim dated 27 November 1999 (“the summons”) on the grounds:

(a) the summons is:

(i) scandalous, frivolous and vexatious; or

(ii) an abuse of the process of the court; and

(b) that by virtue of item 92 of the Ordinance, the plaintiffs’ cause of action had become statute barred on 29 November 1999.

[2] The 1st defendant’s application is supported by the affidavits of Winnie Wong Nai San affirmed on 5 March 2004 and affidavit in reply of Desmond Anura Sahathevan affirmed on 13 April 2004 and opposed by the affidavit of Addy Termizi bin Mohammed Tuah affirmed on 31 March 2004.

[3] The plaintiffs’ claim arose out of an alleged collision which occurred between a motorcycle No. KS 2536Q ridden by the 1st plaintiff and with the 2nd plaintiff as pillion rider along Jalan Bako from the direction of the Bako Causeway going towards Kuching near the Demak Baru Mosque and motorcar No. KD11Q which came from behind and heading towards the same direction.

[4] The issue for the court’s determination is whether the plaintiffs’ claim against the 1st defendant is statute barred.

[5] From Winnie Wong’s affidavit and Desmond’s affidavit, basically, it is the defendants’ contention that by virtue of item 92 of the Schedule to the Limitation Ordinance (Cap. 49) (Sarawak) (“the Ordinance”), the plaintiffs have three (3) years from the date of injury to file its claim and since the accident happened on 29 November 1996, following s. 11 of the Ordinance which provides that “in computing the period of limitation prescribed for any suit,

- A the day on which such period is to be reckoned shall be excluded"; the last day for filing the claim would be 29 January 1999. Therefore, since the plaintiffs' summons is dated 30 November 1999, the plaintiffs' claim is statute barred.
- B **[6]** Based on Addy's affidavit, it is the plaintiffs' contention that:
- C (i) by virtue of item 92 of the Schedule to the Ordinance read together with s. 11 of the Ordinance the date of the filing of the claim should "be forwarded for another day, ie, 30 November 1999, which was eventually the date where summons was issued";
- D (ii) there is no delay since 29 November 1999 is a national polling day and although it is not a public holiday but the firm has agreed to release all the staff and to close the office to allow the staff to vote; and
- E (iii) even if there is a delay, it is only a delay of one (1) day and for *bona fide* reasons, the court should exercise its unfettered discretion on equitable grounds to "disapply a limitation period" ie, extend the period of limitation.
- F **[7]** Item 92 of the Schedule to the Ordinance provides that "for compensation for injury to the person including where death results from such injury, compensation to the family of the deceased", the period of limitation shall be three years from the day when the injury is committed. Section 11 of the Ordinance states that "in computing the period of limitation prescribed for any suit, the day on which such period is to be reckoned shall be excluded". Therefore, I agree with the learned counsel for the 1st defendant, Mr. Desmond Sahathevan, that the last date for the filing of the summons is 29 November 1999 since it is admitted that 29 November 1999 is not a public holiday and it is not disputed it is a Monday wherein the court registry was opened for business. The mode of calculation as above is confirmed in the case of *Kok Song Kong v. Brunei Shell Petroleum Co. Bhd.* [1988] 1 MLJ 240 where the court had to decide a preliminary point of law whether the proceedings in civil suit No. 82 of 1984 are barred by reasons of the provision of Limitation Act (Cap. 14). In that case the plaintiff was involved in an accident on 20 April 1981 and sought damages from the defendant for injuries caused by the negligence of the defendant. At p. 241, the court stated "By virtue of item 92 of the Schedule to the Limitation Act (Cap. 14), the period of limitation for an action for compensation for injury
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to the person is three years from the day when the injury was committed. By s. 11 of Cap. 14, the day on which the cause of action arose is excluded from the three-year limitation period, **which therefore expired on April 20, 1984**". (emphasis added). Item 92 of the Schedule to the Brunei Limitation Act and s. 11 of the same is almost in *pari materia* with item 92 of the Schedule to the Sarawak Limitation Ordinance and s. 11 of the same and therefore the aforesaid case is applicable in the context of this instant case. I therefore find that the contention of the learned counsel for the plaintiffs, Mr. Addy Termizi bin Mohd. Tuah submitting that the date of the filing of the claim should "be forwarded for another day, ie, 30 November 1999, which was eventually the date where summons was issued" is without merit.

[8] Mr. Desmond Sahathevan cited the case of *Alias bin Ismail v. Hairuddin bin Mohamad & Anor* [1997] 4 CLJ 669 and submitted that it is trite law that where the plaintiff's cause of action is statute barred, it is open for the defendant to file an application to strike out the plaintiff's claim and the court has no discretion to set aside a defence of limitation. Further, he cited s. 3 of the Ordinance which states "subject to ss. 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefore by the Schedule, if limitation has been set up as a defence, shall be dismissed". He also cited the case of *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 where Hashim Yeop Sani CJ (as he then was) delivering the judgment on behalf of the Supreme Court gave the rationale for the enactment of the Limitation Ordinance in the following terms.

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. **The rationale of limitation law should be appreciated and enforced by the courts.** (emphasis added)

A [9] Mr. Addy Termizi had urged the court to exercise its discretion to extend the limitation period on equitable grounds and in support, he cited the following authorities:

(i) *Ramsden v. Lee* [1992] 2 All ER 204;

B (ii) *Thomson v. Brown and Anor* [1981] 1 WLR 744;

(iii) *Hartley v. Birmingham City District Council* [1992] 2 All ER 213;

(iv) *Firman v. Ellis* [1978] 1 All ER 853;

C (v) *Halsbury's Laws of England*, 4th edn, vol. 28 at p. 314, para. 694; and

(vi) *Donovan v. Gwentys Ltd* [1990] 1 All ER 1019.

D [10] *Halsbury's Laws of England*, 4th edn, vol. 28 at p. 314, para. 694 states as follows:

E 694. Court's power to override time-limits. **If it appears to the court that it would be equitable to allow an action to proceed** having regard to the degree to which (1) the provisions in respect of the time-limit for personal injury actions or actions under the Fatal Accidents Act 1976 prejudice the plaintiff or any person whom he represents and (2) any decision of the court would prejudice the defendant or any person whom he represents, **the court may direct that those provisions are not to apply to the action or are not to apply to any specified cause of action to which the actions relates.**

F **In so acting, the court must have regard to all the circumstances of the case** and in particular to (a) the length of and the reason for the delay on the plaintiff's part; (b) the extent to which having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed; (c) the defendant's conduct after the cause of action arose including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendant's act or omission to which the injury was attributable might be capable at that time of giving rise to an action for damages and (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of

any such advice he may have received. **In applying these principles the court's discretion is unfettered.** (emphasis added)

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A perusal of the English cases cited above illustrate how the court in the exercise of its unfettered discretion applies the principles referred to in the passage from *Halsbury's Laws of England (ibid)* in overriding the time limit provided under the U.K. Limitation Act 1975 and the U.K. Limitation Act 1939. However, there are no such provisions in the Ordinance which would enable the court to exercise its discretion to apply the provisions of the Ordinance in a similar manner. I am fortified in my view by the following *dicta* of Edgar Joseph Jr FCJ in *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332 at p. 364 d-e when he opined:

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The next point to which I should like to direct attention is the provisio to para 8 of the Schedule which reads: "Provided that this provision shall be without prejudice to any written law relating to limitation". In my view, this provisio is statutory recognition of the principle laid down by the Judicial Committee of the Privy Council more than 60 years ago in *Maqbul Ahmad v. Onkar Prata Narain Singh* AIR [1935] PC 85, that there is no general judicial discretion, outside the Limitation Act, enabling the Court to relieve a suiter from the provisions of the Limitation Act on the ground of hardship and the Court cannot override the provisions of the Limitation Act on equitable considerations. (See also, *Nathan s/o Arumugam v. Chin Jin Tze* [1982] 2 CLJ 555). (emphasis added)

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[11] The long title of the Ordinance states that it is an Ordinance to regulate the limitation of suits. And s. 1 of the Ordinance defines suit to include "any action or any other proceedings". Section 3 of the Ordinance provides "subject to ss. 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefore by the Schedule, if limitation has been set up as a defence, shall be dismissed". It is my view that s. 3 of the Ordinance is a general provision stating that every suit instituted after the period of limitation prescribed by the Schedule, if limitation has been set up as a defence, shall be dismissed. The only exceptions to this limitation rule as prescribed in the Schedule in respect of a suit are contained in s. 4 up to s. 24 of the Ordinance.

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Mr. Addy attempted *vide* para. 12 of his affidavit to invoke one of the exceptions ie, s. 12 of the Ordinance which provides that the time when a defendant is absent from Sarawak can be excluded

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A from the computation of the period of limitation prescribed under the Ordinance. However, there is no evidence adduced that the defendants have left the State of Sarawak for at least a day. Therefore, none of the exceptions contained in s. 4 up to s. 24 of the Ordinance apply to the defendants in this instant case.

B As there are no provisions in the Ordinance to enable the court to exercise its discretion on equitable grounds to override the time limit under the Ordinance, unlike the U.K. Limitation Act, the court is not empowered to exercise any discretion in the manner that Mr. Addy has urged the court to do so following the English authorities even though the delay is only for a day. The issue of whether the plaintiffs have merits or otherwise in respect of his claim is immaterial because the strict provisions of the Ordinance has to be adhered to. (See *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 and *Lembaga Pemegang Amanah Yayasan Sabah and Anor v. Datuk Syed Kechik bin Syed Mohamed and Anor and Other Appeals* [2000] 3 CLJ 797.

E [12] I agree with the views expressed by Mr. Desmond Sahathevan that the case of *Government of Malaysia v. Yee Kok Wei and Anor* (Kuching – Suit No. KG 268 of 1980) is distinguishable as the plaintiff in that case is claiming damages against the defendants for damage caused to a land cruiser owned by the plaintiff by the alleged negligent driving by the 2nd defendant of a Toyota truck owned by the 1st defendant and therefore item 97 of the Schedule to the Ordinance would be applicable; unlike this instant case where the plaintiffs are claiming for injuries suffered as a result of a motor vehicle collision of which item 92 is the relevant provision.

F Similarly, the cases of *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504 and *Cybersoft Sdn Bhd v. Standard Chartered Bank* [2001] 1 AMR 1096 where the plaintiff in both cases had exceeded the six (6) years time limit under s. 3 of the Ordinance read with item 97 of Part IV of the Schedule to the Ordinance are further illustrations that the period of limitation has to be strictly adhered to; otherwise the action would be time barred.

H In addition, I agree with Mr. Desmond Sahathevan that the case of *Lim Yok Kong v. Sivapiran Savapathy* [1992] 4 CLJ 2219 is distinguishable as there is no evidence of fraud upon which the court can invoke s. 18 of the Ordinance in the context of this instant case (equivalent to s. 29 of the Limitation Act 1953 in *Lim Yok Kong's* case) to postpone the period of limitation.

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[13] For the aforesaid reasons, since the 1st defendant has pleaded the defence of limitation in his statement of defence, it is clear premised on the provisions of the Ordinance and the authorities governing the Ordinance that the plaintiffs' action is statute barred and the court has no discretion on equitable grounds to override the provisions of the Ordinance although I do sympathise with the plaintiffs as the delay is only for a day. In the circumstances, I dismiss the appeal of the plaintiffs with costs to be taxed unless otherwise agreed and the decision of the learned Sessions Court Judge is thereby upheld.

[14] On 19 September 2005 I had read the above ruling to both the learned counsel for the plaintiffs and the 1st defendant. However, by consent of parties the ruling was put on hold pending further submissions by the parties on the issue of whether the plaintiffs' claim for special damages in particular, the claim for damage to the motorcycle, helmet, shirt, trousers, shoes, jacket, watch and loss of use of the motorcycle involved in the accident as per items i, j and k of the "Particulars of the 1st plaintiff's special damages" at p. 64 of the record of appeal and item j of the "Particulars of the 2nd plaintiff's special damages" at p. 65 of the record of appeal (hereinafter referred to as "plaintiffs' claim for special damages" unless otherwise stated) is statute barred. Mr. Addy Termizi *vide* his written submission dated 18 January 2006 (encl. 24) contended that it is legally inappropriate for the 1st defendant to base his application by referring only to the personal injuries as the plaintiffs' claim also includes loss and damages caused by the negligence of the defendants (1st defendant was the driver of motorcar No. KD11Q owned by the 2nd defendant). Learned counsel argued that the plaintiffs' claim for special damages including other losses and damages as particularised in pp. 63 to 66 of the record of appeal is a separate claim for damage and property which falls under item 97 of the Schedule to the Ordinance which provides that "suit for which no period of limitation is provided elsewhere in (the Schedule to the Ordinance)" is six (6) years from the time when the right to sue accrues and therefore plaintiffs' claim for special damages is not statute barred. To support his contention learned counsel cited the three cases of *Yee Kok Wei (supra)*, *Ong Ah Bee (supra)* and *Cybersoft Sdn Bhd (supra)*.

[15] In his "further submission of the respondent/1st defendant" (encl. 26), Mr. Desmond Sahathevan submitted that the plaintiffs' claim is not a "suit for which no period of limitation is provided

- A elsewhere in this Schedule” but it is essentially one “for compensation for injury to the person ...” as provided under item 92 of the Schedule and the plaintiffs’ claim for special damages is statute barred as it is a claim stemming from the injuries suffered by the plaintiffs. Learned counsel further submitted that the court
- B must consider if the plaintiffs’ claim is indeed a “Suit for which no period of limitation is provided elsewhere in the Schedule”, which he submitted it is not, citing the case of *Chin Sin Lan v. Delta Finance Bhd.* [2004] 3 CLJ 113. In this case, the Court of Appeal had to consider on appeal by the appellant who opposed the
- C respondent’s creditor’s petition which was granted by the deputy registrar and the judicial commissioner, on the grounds, *inter alia*, whether the bankruptcy proceedings were caught by the limitation period. In deciding this point, the court held that before dealing with the question as to which item in the Sarawak Limitation
- D Ordinance is the relevant item, it had to consider whether bankruptcy proceedings are execution proceedings within the definition of “suit” so as to be caught within the Ordinance which the court answered to be in the negative. However in the present case, there is no dispute as to the applicability of the Ordinance,
- E rather it is a question of which is the relevant item in the Schedule; hence I respectfully find the authority of *Chin Sin Lan* is irrelevant save for the *dictum* made by Gopal Sri Ram JCA with regard to the approach to be taken in interpreting the Ordinance which I shall allude to hereafter.
- F [16] The reasoning as to why the plaintiffs’ contention cannot hold, in my judgment, can be found in the very nature of item 97 of the Schedule itself. In interpreting item 97, I would bear in mind the word of caution of Gopal Sri Ram JCA at p. 184 para
- G A-B in *Chin Sin Lan (supra)* when interpreting the Ordinance by referring to a passage in *Kong Ming Bank Berhad v. Sim Siok Eng* [1982] 2 MLJ 205 wherein His Lordship quoted Lord Scarman at p. 206 – “*The Limitation Ordinance of Sarawak, which is similar to other limitation enactments in Malaysia, is based not on the English*
- H *Statute but on the Indian legislation, the structure of which it follows closely. Argument by analogy from the English law may result, therefore, in error, whereas the Indian and Malaysian case law is a useful guide to the interpretation of the Ordinance.*” (emphasis added). Item 97 of the Schedule to the Ordinance is in *pari materia* with art. 120 of the
- I Indian Limitation Act 1908 which is now art. 113 of the Indian Limitation Act 1963 (the Indian Limitation Act 1908 (Act No. IX of 1908) has been repealed and replaced by the Indian Limitation Act 1963 (Act No. 36 of 1963) which came into force on 1

January 1964) (see p. 11 of *Sanjiva Row's The Limitation Act, 1963* vol. 1, 7th edn, 1973). Article 113 of the Indian Limitation Act 1963 is a "residuary article for cases not governed by the earlier Part and the period is fixed as three years so that no advantage can be gained by seeking to prove that this article applies". The Indian Limitation Act 1963 has omitted arts. 36, 80, 83, 84, 103, 104, 108, 116 and some others of the Indian Limitation Act 1908. Cases falling under the omitted articles, unless they happen to be covered by some specific article, will now be governed by art. 113 and cases which formerly fell under art. 36 would now fall under this article. Article 113 being a residuary article can be resorted to only if no other article in the Limitation Act would apply as held in *S.R. Manickavasagam @ Rajamanickam v. G. Muthuveeraswami Naidu & Ors* AIR [1963] Madras 362. Further, art. 113 should never be invoked, if, upon a reasonable interpretation of its language, some other article can cover a particular suit as held in *Man Singh v. Ram Nath* AIR [1924] Allahabad 828 at p. 830 left column top (see pp. 550-551 of *Sanjiva Row's The Limitation Act, 1963*, vol. 2, 7th edn 1973). Premised on the principles stated by the learned author, I therefore find that item 97 of the Ordinance being a residuary item, it can be relied on only when the suit is one which is not covered by any other specific item in the Schedule to the Ordinance. Hence, in this instant case the court will have to determine whether the suit is covered by any other specific item in the Schedule to the Ordinance and as contended by learned counsel for the 1st defendant to be item 92.

[17] Support for the proposition that item 92 of the Schedule to the Ordinance is the applicable item can be found in the principle stated by the same learned author at p. 551. "In determining, whether a particular suit falls under any other article, regard should be had to the substance of the claim rather than to the particular colouring given to it by the plaintiff". The learned author referred to the case of *Qasim Beg v. Muhammad Zia Beg* AIR [1915] Allahabad 212 where on an appeal the court had to determine whether art. 91 or art. 120 of the Indian Limitation Act 1908 was the more appropriate article in a suit in which the plaintiff sought a declaration that a bond dated 5 October 1904 and executed by him mortgaging certain property being without valid consideration is ineffectual, and that the defendants had no right under it; the court of first instance decreed the claim and the lower appellate court allowed the appeal and dismissed the suit

- A which was confirmed by the court. Piggott J at p. 214 opined “It is open to question how far litigants should be encouraged to claim the benefit of the general art. 120 (limitation period is six years from the time when the right to sue accrues) of the first Schedule to the Indian Limitation Act by going out of their way to ward
- B their plaint so as to escape the application of art. 91 (limitation period is three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him). **Regard should undoubtedly be had to the essence of the suit rather than to the particular colouring**
- C **sought to be put upon it by the plaintiff.**” (emphasis added).

- [18] Looking at the facts of the suit as per the statement of claim dated 27 November 1999 filed by the plaintiffs (pp. 39 to 49 of the record of appeal), in my judgment, the plaintiffs’ claim is
- D primarily a claim for compensation for injury under item 92 of the Schedule to the Ordinance as the plaintiffs are claiming general damages for the injuries sustained from the road accident encountered by the plaintiffs which are particularised in pp. 61 to 63 of the record of appeal; whilst the plaintiffs’ claim for special
- E damages including other losses and damages as particularised in pp. 63 to 66 of the record of appeal is but an outflow of their claim for damages emanating from the said accident. In this case, there is only one cause of action ie, the alleged negligence of the defendants and therefore the claim for general damages and special
- F damages cannot be split following s. 68 of the Subordinate Courts Act 1948 (Act 92), a point conceded by the learned counsel for the plaintiffs. Since I find that item 92 is the specific item which is applicable for purposes of the suit in question, it follows that item 97 being a residuary item is not applicable.

- G [19] As for the cases of *Ong Ah Bee (supra)* and *Cybersoft Sdn Bhd (supra)*, I agree with learned counsel for the 1st defendant that they cannot support the proposition of the plaintiffs that item 97 is applicable in this instance because they are distinguishable on the facts: in the former case, it involved a claim for damages
- H for negligence by a solicitor in the preparation of a sale and purchase agreement and in the latter case, it turned on a claim for negligence against the bank in clearing two foreign banker’s drafts which resulted in purported loss and damages.

- I [20] Learned counsel for the 1st defendant submitted the alternative argument that item 19 of the Schedule is more applicable than item 97 in the event the court finds the plaintiffs’

claim does not fall within item 92 of the Schedule to the Ordinance. Having found item 92 of the Schedule to be applicable for the purposes of the matter at hand and not item 97, it is no longer necessary for me to address the point. Nevertheless for completeness I shall do so. Item 19 of the Schedule pertains to actions “For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specifically provided for” and prescribes a limitation period of two years from when the malfeasance, misfeasance or non-feasance takes place. It is to be noted that unlike the position under the Indian Limitation Act 1963 where art. 36 has been omitted and cases which formerly fall under art. 36 would now fall under art. 113 of the Indian Limitation Act 1963 (which is in *pari materia* to item 97 of the Schedule to the Ordinance), item 19 of the Schedule to the Ordinance (which is in *pari materia* to art. 36) still remains intact and therefore the Indian authorities pertaining to art. 36 would be relevant. Learned counsel submitted on the strength of the decision in *Vun Chun Fah & Anor. v. Telekom Malaysia Bhd* [1977] MLJU 239, misfeasance includes negligence in the driving of a motor vehicle. Learned counsel is correct in pointing out that in that case, Ian Chin J declined to follow the decision in *Yee Kok Wei (supra)* and held that the plaintiff’s claim came within item 20, and not item 97 of the Schedule to the Sabah Limitation Ordinance (which are in *pari materia* with items 19 and 97 of the Schedule to the Ordinance), and as the plaintiff’s claim was not filed within the two year limitation period prescribed therein, it was statute barred. In that case, the plaintiff was claiming for a specific sum of money as damages caused by the negligent driving of the defendant ie, for cost of repair of the damaged vehicle and cost for hiring another vehicle. Although I agree with the reasoning of the learned judge, I find the facts of the case which is more akin to *Yee Kok Wei (supra)* (which I had found to be distinguishable as per para. 12 above) differs from the instant case where the plaintiffs are primarily claiming for injuries sustained in the road accident and the claim for special damages is ancillary thereto and therefore, likewise, it is distinguishable.

[21] For the reasons given, I reiterate the position which I had taken on 19 September 2005 and dismiss the appeal of the plaintiffs with costs to be taxed unless otherwise agreed and the decision of the learned Sessions Court Judge is thereby upheld.